1966

Duane Roylance v. Stephen L. Davies : Respondent's Brief

In the Supreme Court of the State of Utah

DUANE ROYLANCE,
Plaintiff and Respondent,

vs.

STEPHEN L. DAVIES,
Defendant and Appellant.

CASE
NO. 10641

RESPONDENT'S BRIEF

Appeal from the Verdict and Judgment of the
Fourth District Court in and for Utah County,
State of Utah
HONORABLE JOSEPH E. NELSON, District Judge

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NATURE OF CASE

Respondent agrees with appellant's statement of the nature of the case.

DISPOSITION OF LOWER COURT

Respondent agrees with appellant's disposition of lower court.

STATEMENT OF FACTS

Respondent agrees with the statement of facts set forth by appellant.

ARGUMENT

POINT I

THERE WAS EVIDENCE OF WILFUL MISCONDUCT ON THE PART OF THE DEFENDANT.

Few Utah decisions have construed the guest statute of our state, UCA, 1953, Section 41-9-1. "Ordinarily the matter of wilful misconduct is a jury question unless the facts are such that reasonable minds could not conclude that the defendant showed that type of intention or knowledge or indulged in that type of aggravated negligence necessary to create liability on account of wilful misconduct in guest passenger cases. See **Ricciuti vs. Robinson**, 2 U.2d 45, 269 P.2d 282. The Utah Court, however, has defined what constitutes wilful misconduct in a guest case as recently as September 8, 1960, said definition being as follows:

> "Wilful misconduct is the intentional doing of an act or intentional omitting or failing to do an act, with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences."

See **Milligan vs. Harward, et al.**, 11 U.2d 74, 355 P.2d 62.

Substantially, there have been only two fact situations analyzed by the Utah Court, the one fact situation being represented by the type of case such as **Ricciuti vs. Robinson** wherein the driver was speeding and inadvertently dropped a cigarette distracting his attention, and the fact

situation analyzed in the case of **Stack vs. Kearnes,** 22 P.2d 594. In the **Stack vs. Kearnes** case,

> "Warren Stack brought an action against Edwin J. Kearnes to recover damages for personal injuries allegedly sustained when defendant's automobile, in which plaintiff was a guest passenger, overturned on a highway curve. At the first trial the jury returned a verdict of no cause of action against the plaintiff and the trial court granted plaintiff's motion for a new trial. After the second trial, the Third Judicial District Court, Salt Lake County, J. Allen Crockett, J., entered judgment for the plaintiff and the defendant appealed. The Supreme Court, Wolfe, J., held that the trial court had not abused its discretion in granting a new trial since there was sufficient evidence upon which the jury could reasonably have found the defendant guilty of wilful misconduct and that the plaintiff had not assumed the risk of defendant's manner of driving."

The wilful misconduct that the Court referred to in the **Stack vs. Kearnes** case, 22 P.2d 594, was speed of approximately 55 to 60 miles per hour on the regularly traveled portion of a road when the highway was wet and the defendant was rounding a curve, the defendant braking as he rounded said curve, causing the automobile to go out of control and turn over, injuring the guest.

Plaintiff claims that the defendant's conduct was an intentional doing of an act with knowledge that serious injury is a probable and not merely a possible result, or the intentional doing of an act with wanton and reckless disregard of the possible consequences. When Davies intentionally traveled up the shoulder of the road at a place where the law definitely prohibited driving under all of the

adverse conditions, to-wit: on a slick road, with known obstacles, on a dark night, he was certainly flirting with disaster. Plaintiff urges that the fact situation so far as wilful misconduct is concerned is substantially greater than that found in the case of **Stack vs. Kearnes,** 22 P.2d 594, heretofore mentioned.

As heretofore stated, ordinarily the matter of wilful misconduct is a jury question unless reasonable minds could not conclude that the defendant showed that type of intention or knowledge or indulged in that type of aggravated negligence necessary to create liability on account of wilful misconduct in a guest passenger case. See **Ricciuti vs. Robinson,** 269 P.2d 282. Certainly it would appear that reasonable minds could conclude that defendant did show that type of intention or knowledge or indulged in that type of aggravated negligence necessary to create liability on account of wilful misconduct.

Plaintiff now cites other authorities than Utah who have dealt with the subject of wilful or wanton misconduct under guest statutes.

> "Whether particular acts or omissions in operating a motor vehicle constitute gross negligence, wilful or wanton misconduct, reckless disregard for the safety of others, or heedlessness which will permit recovery under a guest statute or comparable common-law rule for injuries to or the death of a gratuitous guest riding therein, depends largely upon the surrounding circumstances, and every pertinent act or omission entering into the particular accident is to be considered."

See 8 Am Jur 2d 506, Automobiles and Highway Traffic.

"Excessive speed alone does not constiute gross negligence, wilful or wanton misconduct, disregard of the safety of others, recklessness, or the like, within the meaning of a guest statute or comparable common law rule, but is a factor to be considered in determining whether the operator of a motor vehicle was guilty of such conduct. However, excessive or unlawful speed coupled with other facts, such as driving at high speed through patchs of fog in thick traffic or around a dangerous curve, or without keeping a proper lookout, may be sufficient to establish liability to a gratuitous guest under such a statute or rule."

See 8 Am Jur 2d 507, Automobiles and Highway Traffic; also, 6 ALR 3rd 769.

A case that has at least two of the elements found in the Roylance vs. Davies case which is now being considered in the Court is **Davis vs. Hollowell,** 40 N.W. 2d 641. In the **Davis vs. Hollowell** case, plaintiff and defendant had been together during the entire evening and until the following morning at sun up. During that time, they had both consumed intoxicating liquor. On the way home, defendant, Davis, had driven at approximately 60 miles per hour on the regularly traveled portion of the road, the same being a country road with an uneven surface. In answer to special questions submitted to the jury, the jury found that defendant Davis, was under the influence of liquor when she left the party. That defendant, Davis, did not lose control of the car solely as a result of the excessive speed in loose gravel, that the accident was not caused solely by excessive speed, and that it was not caused solely by the intoxication of the driver.

The Court in that case pointed out that while excessive speed alone is not sufficient to establish liability under the guest statute calling for wilful wanton misconduct, nor was merely driving while under the influence of liquor itself adequate, both are matters to be considered along with the other circumstances in determination of a finding of wilful misconduct.

Another case which restates the proposition that while speed alone may not be sufficient to constitute wilful misconduct, it is a matter to be taken into consideration with all of the circumstances is the case of **Bernard Rodney, Administrator, etc., of Rose Staman, Deceased, vs. Harry H. Staman, Executor, etc., of Paul Staman ,Deceased,** May 27, 1952, 371 Pa 1, 89 A2d 313, 32 ALR 2d 976. The only evidence concerning the accident was the uncontradicted testimony of a living eye witness, a truck driver, and some photographs of the scene taken immediately after the accident. The evidence established that on a rainy and misty day, the Staman car was being driven at a speed of 75 to 80 miles per hour, down hill, on a wet, brick-top road twenty feet wide, into a curb at the bottom of the hill. Preceding the collision for five and one-half miles, the road had been "awful curvy". The shoulder of the road was soft. As the Staman car approached the curve, its right wheels went off the roadway onto the shoulder. It immediately came back onto the road at a sharp angle, crossed over the center line, and crashed into the left front of the truck in which the driver was slowing down and pulling off of the road toward the right-hand side. The defendant contended that the evidence was insufficient to go to the jury on the question of the driver's wilful wanton

misconduct on the ground that there is no evidence as to the driver's state of mind, and that excessive speed alone is not sufficient evidence of the requisite misconduct.

The Court pointed out as to the driver's state of mind,

> "Such a disposition or mental state is shown by a person, when, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, he proceeds into the presence of the danger, with indifference to consequences and with absence of all care."

To show the requirement of culpable knowledge on the part of the driver, the Court points out that it is not necessary that such knowledge be actual or that it be established subjectively. It is sufficient to show ". . . circumstances tending to disclose that the motorist knows or should know that an injury to his guest will be the probable result of such conduct." The Court further points out,

> "Whether the driver's state of mind be proven subjectively or objectively, the jury tests his conduct by the standard of care of the reasonable man."

The Court says,

> "The excessive speed of the driver of the automobile in the instant case takes on material significance when considered in connection with other attendant factors such as the sharp curve at the foot of the descending grade, the wet condition of the relatively narrow brick roadway, the presence of the truck deecending the opposite hill to the same curve and the force with which the Staman car must have crashed into the truck as evidenced by the photograph. Under these conditions, it was for the jury to say whether

the driver of the Staman car with 'conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to other, . . . proceeded into the presence of the danger, with indifference to consequences and with absence of all care.' If he did, then he was guilty of wilful and wanton misconduct under the Ohio Statute."

Plaintiff calls the Court's attention to the fact that the jury could have received absolutely no testimony in this case as to a warning on behalf of the guest that the host's conduct was objectionable, because both parties in the automobile were dead. The **Rodney vs. Staman** case is similar to the Roylance vs. Davies case now being considered by the Court, because the host driving the automobile on the wrong side of the road under the conditions heretofore set forth with all of the obstacles and knowledge on behalf of Davies certainly show wanton misconduct as clearly as if the defendant had said, "Here I go, regardless of consequences." In the Roylance vs. Davies case, a very strong case is made out because the driving was completely proper to the very point where the wilful, wanton misconduct must begin some place and certainly it should not prejudice the plaintiff's rights in this matter if it was only seconds before the inflicted injury that the host engaged in the wilful, wanton miconduct. In the Roylance vs. Davies case, we even have a stronger stipulation, because it is uncontradicted that the defendant, Stephen Davies, knew of each and every one of the hazardous conditions and yet willfully traveled from the correct path into certain peril.

Another case that speaks of speed in connection with other circumstances is **Adam E. Buroker vs. Herbert G.**

Brown, Supreme Court of Indiana, March 9, 1961, 172 N.E. 2d 849. The Court there states:

"We adopt the rule as stated by the Wyoming Supreme Court in Meyer vs. Cully, supra, at page 94 of 241 P.2d:

" 'While it is generally true that mere speed of itself does not constitute wilful misconduct yet there may be a point at which the speed became so excessive that the danger of injury to a guest was probable at such extreme speed and that this might constitute wilful misconduct. Needless to say the circumstances appearing in each case must rule this point.' "

Also, 237 Ind. at page 608, 145 N.E. 2d at page 902 this Court stated:

"We recognize that 'When one by a continuous course of conduct seems to exercise no concern for others he may be both wilful and wanton.' Kahan vs. Wecksler, 1938, 104 Ind. App. 673, 678, 12 N.E. 2d 998, 1000.

"It is also true that 'acts such as exhibit a conscious indifference to consequences, make a case of constructive or legal wilfulness.' Bedwell vs. DeBolt, supra, 1943, 221 Ind. 600, 607, 50 N.E. 2d 875."

WRONG SIDE OF ROAD, 8 Am Jur 2d 517, Automobiles and Highway Traffic

"Driving on the wrong side of the road does not necessarily constitute gross negligence, wilful or wanton misconduct, or recklessness, within the meaning of a guest statute or comparable common law rule, at least where such improper driving is inadvertent. However, needlessly driving a motor vehicle on the wrong side of a highway in the face of another motorist ap-

proaching from the opposite direction and in plain view, has been held to constitute such misconduct, and will render the owner or operator liable for injuries sustained by a gratuitous guest as a result thereof."

One of the cases cited for the above text statement is the case of **LeFeve vs. Ascher, Cignoni vs. Same,** 198 N.E. 251. In the **LeFeve vs. Ascher** case, the highway was slippery, it having snowed during the early morning. As the defendant approached a curve on a ten-percent grade, the defendant pulled out to pass a truck at a proximate speed of 20 to 25 miles per hour. When the defendant's car was even with the car he was passing, another car came into view from the opposite direction traveling at the proximate speed of 30 to 35 miles per hour, and a collision occurred resulting in injury.

Massachusetts has a statute,

"Whenever on any way, public or private, there is not an unobstructed view of the road for at least one hundred yards, the driver of every vehicle shall keep his vehicle on the right of the middle of the traveled part of the way, whenever it is safe and practicable so to do."

In this case, the Court was talking of gross negligence and not wilful misconduct, but again they state the same thing,

"Whether there had been such gross negligence must depend chiefly upon the particular circumstances of each case. The combination of facts in the case at bar was the steep grade, the sharp curve, the extremely icy and slippery condition of the surface of a main highway of travel, the impossibility of seeing ahead more than 100 feet, the insistence of the defendant in spite of appropiate warning upon attempting to pass

the large truck involving necessity of violation of the law of the road by driving very much to his left of the center of the road when he had an unobstructed view of the road only 25 yards, and the difficulty of passing the truck quickly."

These factors alone would not show gross negligence. All of them grouped together warranted the findings of the jury.

In the case now being considered by the Court of Roylance vs. Davies, plaintiff contends that defendant's driving on the wrong side of the road was a definite factor showing wilful misconduct, that is, defendant in order to satisfy a whim of his own was willing to ignore the rules of the road and proceed in an unlawful manner along a course studded with hazards under adverse conditions. A steel utility pole on the wrong side of the road and a car approaching on the wrong side of the road are both hazards and the resulting effect would differ only in the matter of force. As demonstrated in this case, certainly a steel utility pole was sufficient to do considerable damage.

DRIVING WITH VISION OBSCURED, 8 Am Jur 2d 509, Automobiles and Highway Traffic

8 Am Jur 2d 509, Automobiles and Highway Traffic, states as follows:

"The manner of operation of a motor vehicle when the vision of the operator is obscured by smoke, dust, atmospheric conditions, or an unclean windshield, may, under the circumstances, constitute gross negligence, wanton or wilful misconduct, recklessness, or heedlessness within the meaning of a guest statute rendering the owner or operator liable for injuries to a gratuitous

guest riding therein. For example, driving fast in a fog, resulting in a collision with a motorist coming from the opposite direction, or with a parked or standing vehicle, may render the owner or operator liable for injury to his gratuitous guest under a guest statute. Likewise, the owner or operator of a motor vehicle may be held liable for injuries sustained by a gratuitous guest when the vehicle is driven in the rain at an unreasonable rate of speed under the circumstances, and runs or skids off the road. Similarly, the manner in which one drives when mist obscures his vision, or through a snowstorm, or when he is unable to see through his windshield because of frost or sleet, may be sufficient to charge the owner or operator with liability under a guest statute for injuries sustained by a gratuitous guest as a result of such conduct. In most cases, whether, under the circumstances, the manner of operation of a motor vehicle with vision obsured constitutes such misconduct as will render the owner or operator thereof liable for injuries sustained by a gratuitous guest, is a question for the jury."

Returning now to the fact situation in the Roylance vs. Davies case, at the time the accident occurred, it was snowing and dark. Plaintiff contends that this is just one more factor coupled with all of the other factors that shows wilful misconduct.

The case of **Childs, et al. vs. Radzevich,** 139 F.2d 374 interprets a District of Columbia guest statute which provides that no person transported as a guest by the owner of a motor vehicle shall be entitled to recover damages for injuries resulting from its operation, "unless such death or injury was caused or resulted from the gross negligence or wilful and wanton disregard of the safety of the person * * * being so transported on the part of such owner

" The facts roughly in that case are that the defendant at a proximate speed of 50 miles per hour failed to heed a stop sign and traveled from a dirt gravel road on to a macadamized portion of the road which was slippery as a result of the rainfall and skidded, striking a utility pole.

The Court, in that case, points out that this is a fact situation that should be submitted to the jury. Similar to the case that is now being considered by the Court, to-wit: Roylance vs. Davies, whether or not the stop sign was there had no bearing whatsoever upon the end result because the automobile was proceeding at a certain speed from one surface of the road onto another surface of the road and did not involve cars traversing the intersected highway, which is another illustration of the violation of the law of the road being merely one other evidence of the wilful misconduct and in the case of Roylance vs. Davies, being on the wrong side of the road.

Another case that has a somewhat similar element to the Roylance vs. Davies case is the case of **Miller vs. Erickson, et al.,** 76 F.2d 599. In that case, the defendant's conduct consisted of driving at night in a thick snowstorm at a speed of at least 25 miles per hour and colliding with a parked car properly lighted. The Vermont guest statute called for gross negligence which was defined according to their law as the defendant conducting himself with utter recklessess of the safety of others, which is not greatly different from the Utah definition of wilful misconduct. Judgment was rendered against the defendant and the Court said,

"The judgment against Erickson appears to us jus-

tified. He was driving a motorcar at a speed of a least twenty-five miles an hour through a village at night in a thick snowstorm, when by his own statement he could not see ahead more than sixty or seventy feet."

Attention is called to the point that in the Roylance vs. Davies case, that although Davies knew the post was there, he did not even see it.

POINT II

DEFENDANT'S CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY.

If Roylance was injured when Davies ran into the telephone pole, and the same is established by the evidence properly admitted in this case, plaintiff contends that the only proximate cause of the injury to Duane Roylance was Stephen Davies' conduct. See **Hillyard vs. Utah By-Products Company,** 263 P.2d 287.

POINT III

THE CONDUCT COMPLAINED OF BY PLAINTIFF, THAT IS, DRIVING NORTH ALONG THE SHOULDER OF A ROAD RESERVED FOR SOUTHBOUND TRAFFIC WAS ONE FACTOR IN SHOWING WILFUL MISCONDUCT OF THE DEFENDANT, AND THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES WAS THE WILFUL MISCONDUCT OF DEFENDANT AS DEFINED BY THE COURT.

Plaintiff's theory in this matter is that it is wilful misconduct on behalf of the defendant which plaintiff com-

plaints of and the said wilful misconduct was the proximate cause of plaintiff's injuries. This is the theory upon which the case was presented to the jury and upon which plaintiff relies. See Instruction No. 2 given by the Court in the Roylance vs. Davies case. It is the plaintiff's contention that the driving on the wrong side of the road is a circumstance that plaintiff had a right to show to prove by independent evidence the defendant's wilful misconduct.

POINT IV

THE EVIDENCE AS A MATTER OF LAW DID NOT SHOW THAT THE PLAINTIFF WAS GUILTY OF CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF RISK.

The Court instructed the jury on the theory of assumpton of risk and contributory negligence. The instructions took the usual form and the jury found against the defendant on these theories. Plaintiff contends that whether or not there was contributory negligence or assumption of risk was a jury question.

POINT V

THE COURT DID NOT ERR IN ITS INSTRUCTIONS TO THE JURY.

Instruction No. 2 informed the jury of both plaintiff's and defendant's theories of the action as plead by the parties. Instruction No. 4 further defined what the burden of proof was as to the respective parties. Instruction No. 5 sets out the Utah Traffic Law as it was applicable to the roadway in question. **UCA, 1953, Section 41-6-63:10.**

Instruction Nos. 2 and 4 are in the usual standa form which is supplemented adequately by later definitio As to Instruction No. 5, certainly the plaintiff should b allowed to prove the actual rule of the road where the co lision occurred since the action is based upon wilful mi conduct and the violation of this rule of the road was on factor to show wilful misconduct.

CONCLUSION

Ordinarly the matter of wilful misconduct is a jur question unless reasonable minds could not conclude tha the defendant showed that type of intention or knowledg or indulged in that type of aggravated negligence necessar to create liability on account of wilful misconduct in a gue passenger case. The lower court properly instructed th jury as to wilful misconduct and the definition thereof. Th jury unanimously rendered a correct verdict.

Defendant's wilful misconduct was the proximate cau of plaintiff's injuries.

The verdict should be affirmed.

Respectfully submitted,

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